STATE OF MICHIGAN

COURT OF APPEALS

SHEPLER'S, INC., d/b/a SHEPLER'S MACKINAC ISLAND FREIGHT, Plaintiff-Appellant, v CITY OF MACKINAC ISLAND, Defendant-Appellee.	UNPUBLISHED October 25, 2005 No. 263151 Mackinac Circuit Court LC No. 04-005918-CZ

Before: Gage, P.J., and Hoekstra, and Murray, JJ.

PER CURIAM.

Plaintiff, a freight-delivery service, appeals as of right the trial court's order granting summary disposition to defendant, the municipality where plaintiff does business. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In 1994, plaintiff sought a business license to allow it to deliver freight to Mackinac Island. In response to concerns about plaintiff's lack of capacity to load horse-drawn drays on its own premises, and its resulting expectation to rely instead on public streets for this purpose, plaintiff proposed restricting its hours of such operation to avoid the more congested times of day. Plaintiff operated with such restrictions for several years, but eventually asked that all time restrictions be lifted. Defendant's city council heard opinions on the likely effects of such a change, and voted to retain the restrictions.

Plaintiff filed suit alleging violations of due process and equal protection, and restraint of trade. The trial court granted summary disposition to defendant on the ground that plaintiff had failed to show that the restrictions were unreasonable.

We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), "we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Rose, supra* at 461. Summary disposition is appropriately granted, "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* We also review de novo the constitutionality of an ordinance. *Twp of Plymouth v Hancock*, 236 Mich App 197, 199; 600 NW2d 380 (1999). "An ordinance is presumed to be constitutional and

will be so construed unless the party challenging the statute clearly establishes its unconstitutionality." *Id*.

Plaintiff argues that defendant exceeded its authority because it is authorized to grant or deny licenses, but not to grant one with conditions. Plaintiff additionally points out that its competitor is allowed to operate without time restrictions, and argues that this inconsistency constitutes a denial of substantive due process and equal protection. Plaintiff reiterates the latter theory under the rubric of common-law restraint of trade.

A person's right to due process of law when facing certain kinds of adverse action at the hands of the state or one of its subdivisions is guaranteed by both the federal and state constitutions. US Const, Am XIV, § 1; Const 1963, art 1, § 17. "Due process protects vested property rights or entitlements." *Michigan Ed Ass'n v State Bd of Ed*, 163 Mich App 92, 98; 414 NW2d 153 (1987).

Defendant's municipal code sets forth various qualifications for obtaining a business license. These include payment of all property taxes, compliance with zoning and building code requirements, and, most significantly for present purposes, that "[t]he operation of the business will not be to the detriment of the health, safety and welfare of the people of the city or its visitors."

As an initial matter, we note that plaintiff itself proposed the restrictions it initially operated under in the course of obtaining its license. Under the doctrine of judicial estoppel, "a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding." *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994)(emphasis omitted). Having itself proposed restrictions as a means of obtaining a license that otherwise would have been denied, plaintiff should not now be heard to challenge the propriety of conditioning the grant of a business license this way. In any event, we regard as inhering within defendant's ordinance-based prerogative to deny a license because of concerns for the "health, safety and welfare" of the public the prerogative to grant a license with restrictions intended to guard those public interests.

Plaintiff also argues that because the ordinance does not set forth specific criteria governing how restrictions might be imposed on licenses, the scheme is unconstitutionally vague because it encourages subjective or discriminatory application on the part of those empowered to enforce it. See *Twp of Plymouth, supra* at 200. This argument thus effectively merges with plaintiff's substantive due process and equal protection arguments.

"[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v Burch*, 494 US 113, 125; 110 S Ct 975; 108 L Ed 2d 100 (1990), quoting *Daniels v Williams*, 474 US 327, 331; 106 S Ct 662; 88 L Ed 2d 662 (1986). "[A] claim may be based on a denial of substantive due process where a plaintiff is deprived of property rights by irrational or arbitrary governmental action." *Bevan v Brandon Twp*, 438 Mich 385, 391; 475 NW2d 37 (1991)(internal quotation marks and citation omitted).

Both the federal and state constitutions also guarantee equal protection under the law. US Const, Am XIV, § 1; Const 1963, art 1, § 2. Equal protection means "persons similarly

situated should be treated alike." *Cleburne v Cleburne Living Center*, 473 US 432, 439; 105 S Ct 3249; 87 L Ed 2d 313 (1985), citing *Plyler v Doe*, 457 US 202, 216; 102 S Ct 2382; 72 L Ed 2d 786 (1982). The first step in equal protection analysis is to determine what level of judicial scrutiny is appropriate for the occasion. Where the differentiation established by the challenged scheme neither involves inherently suspect classifications nor affects a fundamental liberty interest, no heightened scrutiny is called for. The "rational basis" test applies, meaning that the law should be upheld if it rationally relates to any legitimate governmental interest. *Plyler, supra* at 216-217. "Under the rational basis test, the legislation is presumed to be constitutional and the party challenging the statute has the burden of proving that the legislation is arbitrary and thus irrational." *People v Pitts*, 222 Mich App 260, 273; 564 NW2d 93 (1997). Plaintiff characterizes itself as a "class of one" for present purposes, and does not suggest that anything other than a rational basis review is appropriate in this instance.

"A rational basis shall be found to exist if any set of facts reasonably can be conceived to justify the alleged discrimination." *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286, 290; 590 NW2d 612 (1998). However, "[a]lthough the rationality test is highly deferential, its function is to ensure that classifications rest on something other than a naked preference for one person or group over another." Sunstein, *Naked Preferences and the Constitution*, 84 Colum L Rev 1689, 1713 (1984).

The trial court stated that what plaintiff characterizes as its direct competitor, Arnold Freight Line, is a "dissimilar business operation." Plaintiff complains that the trial court made a factual finding before the completion of discovery. In deciding motions for summary disposition, "[t]he court may not make factual findings or weigh credibility[.]" *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). However, plaintiff does not dispute that Arnold completes its loading of drays and horses on its own premises, in contrast to plaintiff's reliance on public streets to attach its containers, or koreys, to horse-drawn drays. Instead, plaintiff argues that the evidence will show that its activities contribute to street congestion but minimally, or at least no more than do the activities of Arnold.

However, this was not a matter of first impression for decision by the trial court. Instead, it was defendant's city counsel that gauged the consequences of liberalizing plaintiff's license. Plaintiff does not suggest that it was denied a chance to make its case before the city council, and does not specifically accuse any city officials of any corruption.

Because plaintiff relies on use of the public streets as part of its freight loading operation, but Arnold does not, defendant has a rational basis for imposing time restrictions on plaintiff's operating license but not on Arnold's. The court correctly granted summary disposition to defendant.

Affirmed.

/s/ Hilda R. Gage
/s/ Christopher M. Murray

I concur in result only.

/s/ Joel P. Hoekstra